

*a***RE STEPHEN WONG LEONG KIONG;
EX P HSBC BANK MALAYSIA BHD**HIGH COURT MALAYA, SEREMBAN
LOW HOP BING J

[BANKRUPTCY NO: 29-155-2001]

b

21 FEBRUARY 2005

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BANKRUPTCY: *Creditor's petition - Validity of creditor's petition - Whether date of act of bankruptcy in creditor's petition incorrect - Whether a mere formal defect or irregularity - Whether any substantial injustice caused - Whether amendable - Bankruptcy Rules 1969, r. 66 - Rules of the High Court 1980, O. 3 r. 2(2), (5)*

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This was an appeal by the judgment debtor ('the JD') against the decision of the learned registrar dismissing the JD's application seeking to dismiss the creditor's petition ('the CP') pursuant to s. 6(3) of the Bankruptcy Act 1967 ('the BA'). The JD submitted that the CP was defective, invalid and of no legal effect as the date of the act of bankruptcy stated in the CP was incorrect – 2 June 2001 instead of 7 June 2001 – and could not be cured by way of amendment. The JD relied on rr. 2, 66 and 276 of the Bankruptcy Rules 1969 ('the BR') and O. 3 r. 2(1), (2) and (5) of the Rules of the High Court 1980 ('the RHC'), adding that bankruptcy proceedings are of a quasi-penal nature in which procedural requirements must be strictly complied with. The judgment creditor ('the JC') however contended that under r. 66 of the BR read with s. 3(1)(i) of the BA, the correct date was 2 June 2001 and that the RHC would not apply in this instance.

*f***Held (dismissing the appeal):***g**h**i*

[1] A proper construction of r. 66 of the BR gives rise to a *lacuna* in that it does not provide for the reckoning of the seven-day period contained in s. 3(1)(i) of the BA. That being the case, the RHC would apply, and under O. 3 r. 2(2) of the RHC, the day on which an act is required to be done within a specified period after or from a specified date shall itself be excluded from the reckoning of the period of time, whether it was a period of 30 days or as in the instant appeal, seven days. Furthermore, following the clear provisions of O. 3 r. 2(5) of the RHC which provides specifically for instances where the period of reckoning is seven days or less, the following days are excluded: (a) the day before the weekly holiday; (b) the weekly holiday; or (c) public holiday. Thus, Saturday would be

excluded by virtue of being the day before the weekly day, which would put the correct date of the act of the bankruptcy in this appeal on 7 June 2001, and not on 2 June 2001 as stated in the CP. (pp 507 g, 508 e-f, 509 h & 510 g) a

[2] However, the misstatement as to the incorrect date herein was a mere formal defect or irregularity that did not cause any substantial injustice and was not one that could not be remedied by an order of the court *eg*, by way of an amendment to the misstatement of the incorrect date of 2 June 2001 to the correct date of 7 June 2001, which this court hereby does. Although bankruptcy proceedings are of a quasi-penal nature and it is imperative that procedural requirements are strictly complied with, there had been no submission that the JC had not strictly complied with the procedural requirements. (pp 513 f-h & 514 a) b
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Case(s) referred to:

Abdul Hamid & Anor v. Polynesia Offshore Supplies (M) Bhd [1990] 3 MLJ 94 (**refd**) d
AJE Best-On Sdn Bhd v. YB Ahmad Omar & Anor [2000] 3 CLJ 515 HC (**not foll**)
Bank Utama (M) Bhd v. Seri Mayhwa Sdn Bhd & Ors [2001] 5 MLJ 169 (**foll**)
Re a Debtor (No 31 of 1969), ex parte the Debtor v. Triggs turner & Co [1970] 1 All ER 920 (**refd**)
Re Arif Siongong, ex p Arab Malaysian Finance Bhd [1995] 4 BLJ 359 HC (**foll**)
Re Fadzil Othman, ex p Malayan Banking Bhd [1994] 2 MLJ 474 (**not foll**) e
Re Lau Hieng Yee [1999] 4 CLJ 582 HC (**refd**)
Re Liow Fong Mooi, ex p Malayan Banking Bhd [2000] 6 CLJ 63 HC (**foll**)
Re Pg Ahmad Pg Hj Abdullah; ex p Oriental Bank Bhd [1991] 3 CLJ 2899; [1991] 3 CLJ (Rep) 463 HC (**refd**)
Re V David, ex p United Asian Bank Bhd [1991] 2 MLJ 127 (**refd**)
Tengku Iskandar Tengku Ahmad v. Sime Bank Bhd [2002] 1 MLJ 312 (**refd**) f

Legislation referred to:

Bankruptcy Act 1967, ss. 3(1)(i), 6(3), 93(3), 131
 Bankruptcy Rules 1969, rr. 2, 66, 276
 Rules of the High Court 1980, O. 1 r. 2(1), O. 3 r. 2(1), (2), (5), O. 56 r. 1(3) g
 Bankruptcy Act 1914 [UK], s. 109(3)

For the judgment debtor - LH Chua; M/s LH Chua

For the judgment creditor - Norazam Mohd Daud; M/s Stanley Ponniah, Ng & Soo

Reported by Suresh Nathan h

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*a***JUDGMENT****Low Hop Bing J:****Appeal**

b This is an appeal in enclosure (13) filed by the judgment debtor (“the JD”) against the decision of the learned registrar who had on 8 November 2002 dismissed with costs the JD’s application *vide* enclosure (8) by way of summons in chambers which sought to dismiss with costs the creditor’s petition (“the CP”) pursuant to s. 6(3) of the Bankruptcy Act 1967.

c A reference hereinafter to a section is a reference to that section in the Bankruptcy Act 1967, unless the context otherwise requires.

Factual Background

d On 13 March 2000, the judgment creditor (“the JC”) entered into and recorded a consent judgment (“the judgment”) against, *inter alia*, the JD *vide* Seremban High Court Suit No. 22-177-1999.

On 28 February 2001, on the ground that the JD has failed, neglected and omitted to abide by the judgment, the JC filed a request to issue a bankruptcy notice together with a bankruptcy notice.

e On 25 Friday May 2001 at 11.15am, a certified true copy of the judgment, a copy of the request and a sealed copy of the bankruptcy notice were served on the JD.

f On 9 August 2001, the JC filed the CP together with an affidavit affirmed by one Lee Hon Siong on 31 July 2001, verifying the CP.

A sealed copy of the CP together with the affidavit of Lee Hon Siong was served on the JD on 27 February 2002.

g At all material time, even until today, there has been no attempt by the JD to comply with the judgment sum stated in the bankruptcy notice and the CP. *Vide* enclosure (8), the JD prayed for an order that the CP be dismissed on two grounds *viz.* that the date of the act of bankruptcy stated in the CP is incorrect and that the incorrect date cannot be cured by amendment.

Incorrect Date

h Mr. L.H. Chua learned counsel for the JD submitted that the CP is defective, invalid and of no legal effect as the date of the act of bankruptcy was far from being correct, as the date, if at all, should have been 7 June 2001 and not on 2 June 2001 as stated in para 4 of the CP. The JD relied on rr. 2, 66 and 276 of the Bankruptcy Rules 1969 (“the BR”) as amended *vide* Am. PU(A)

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60/93, and O. 1 r. 2(1) and O. 3 r. 2(1), (2) and (5) of the Rules of the High Court 1980 (“the RHC”), adding that bankruptcy proceedings are of a quasi-penal nature in which procedural requirements must be strictly complied with, on the basis of *Re Pg. Ahmad bin Pg. Haji Abdullah; Ex Parte: Oriental Bank Bhd.* [1991] 3 CLJ 2899; [1991] 3 CLJ (Rep) 463. a

He also submitted that there was a lacuna in r. 66 of the BR by virtue of which, under r. 276 thereof, resort can be had to the RHC. b

For the JC, Mr. Norazam bin Mohd Daud responded that under r. 66 of the Bankruptcy Rules read with s. 3(1)(i), the correct date was 2 June 2001, and that the RHC would not apply here. c

I shall first deal with the preliminary issue pertaining to the application of the relevant rules regulating the reckoning of the seven-day period as contained in the expression “within seven days after service of the notice” under s. 3(1)(i). d

Rule 2 of the BR specifically provides for the application of the BR to all proceedings in bankruptcy under the Bankruptcy Act 1967. The time of day of service is contained in r. 66 of the BR which merits reproduction as follows:

66. Time of day of service. e

Service shall be effected before the hour of half past three in the afternoon, except on days preceding weekly holidays when it shall be effected before the hour of 12 noon. Service effected after half past three in the afternoon on any week day except the day preceding a weekly holiday shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day. Service effected after 12 noon on a day preceding a weekly holiday shall for the like purpose be deemed to have been effected on the day following the weekly holiday. f

Rule 66 has been relied on by learned counsel for both the JC and the JD respectively. Upon a proper construction of r. 66, I am of the view that r. 66 does give rise to a *lacuna* in that it does not provide for the reckoning of the seven-day period contained in s. 3(1)(i). My view is supported by the common ground shared by both the learned counsel in this respect. That being the case, the RHC shall apply, as provided for in r. 276 of the BR in the following words: g

276. Rules of the High Court applicable in the event of lacunae. h

In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of the High Court shall apply, *mutatis mutandis*. (Am. PU(A) 60/93] i

a See also *Re Lau Hieng Yee* [1999] 4 CLJ 582 per Tee Ah Sing J at p. 587d.

The reckoning of a period of time is provided for in O. 3 r. 2(1), (2) and (5) of the RHC in the following words:

2. Reckoning periods of time. (O. 3 r. 2)

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(1) Any period of time fixed by these rules or by any judgment, order or direction for doing any act shall be reckoned in accordance with the following provisions of this rule.

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(2) Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.

(3) ...

(4) ...

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(5) Where, apart from this paragraph, the period in question, being a period of 7 days or less, would include the day before the weekly holiday, the weekly holiday or public holiday, that day shall be excluded.

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In my view, under O. 3 r. 2(2), the day on which an act is required to be done within a specified period after or from a specified date, that day itself shall be excluded from the reckoning of the period of time, whether it was a period of eg, thirty days, or seven days as in the instant appeal.

Specifically, where the period for reckoning is a period of seven days or less, O. 3 r. 2(5) provides for the exclusion of each of the following days:

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(a) the day before the weekly holiday;

(b) the weekly holiday; or

(c) public holiday.

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The exclusion is intended to ensure that the reckoning of the short period of seven days or less would only include clear working or office days so that the aforesaid excluded days would not be reckonable days.

In this respect, I am mindful of two High Court decisions which considered O. 3 r. 2(5) and which deserve further discussion.

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In *AJE Best-On Sdn Bhd v. YB Ahmad Omar & Anor* [2000] 3 CLJ 515, the plaintiff's application for summary judgment was dismissed by the registrar on Tuesday 6 April 1999. Under O. 56 r. 1(3), the notice of appeal to judge in chambers must be issued within five days of the dismissal. The plaintiff filed a notice of appeal on 13 April 1999, but the defendant raised a

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preliminary objection that it was filed out of time. The plaintiff's submission was that pursuant to O. 3 r. 2(5), "the day before the weekly holiday" ie, a Saturday in Penang should be excluded so that the notice of appeal was on time. RK Nathan J did not accept that submission, and instead included 10 April, a Saturday in the computation of the five days. For purposes of clarity and completeness, I would respectfully tabulate the learned judge's computation as follows:

Date	Computation of Five Days	
Tuesday 6 April 1999	Date of dismissal of plaintiff's application for summary judgment: excluded under O. 3 r. 2(2)	a
Wednesday 7 April	first day	
Thursday 8 April	second day	
Friday 9 April	third day	d
Saturday 10 April	fourth day	
Sunday 11 April	weekly holiday: excluded under O. 3 r. 2(5)	e
Monday 12 April	fifth day	
Tuesday 13 April	sixth day	

On the other hand, in *Bank Utama (M) Bhd v. Seri Mayhwa Sdn Bhd & Ors* [2001] 5 MLJ 169, the notice of appeal to judge in chambers, pursuant to O. 56 r. 1, was issued on Thursday 13 April 2000 while the decision was made on Friday 7 April 2000. A similar objection was raised that the notice of appeal was issued out of time. Sulaiman JC (now J) held that 8 April 2000 being the day before a weekly holiday should be excluded, as well as 9 April 2000 which was a Sunday, so that the notice of appeal was issued on time, the reckonable days being 10, 11, 12 and 13 April. The learned judge rejected the defendant's contention that the five-day period should run from 8 April 2000, as that was a Saturday and not a weekly holiday and since the notice of appeal was issued on 13 April 2000, it had exceeded the five days prescribed therefor by one day.

With the utmost respect, I would agree with the decision of Sulaiman JC (now J) in relation to the exclusion of Saturday being the day before the weekly day, under the clear provisions of O. 3 r. 2(5); and respectfully decline to follow the decision of RK Nathan J to the contrary.

- a* In the instant appeal, the reckoning of the seven days may be exemplified as follows:

	Date	Reckoning of seven days pursuant to Rules of High Court
<i>b</i>	Friday 25 May 2001 @ 11.15am	service of Bankruptcy Notice – (excluded under O. 3 r. 2(2))
	Saturday, 26 May 2001	the day before the weekly holiday in Negeri Sembilan – (excluded under O. 3 r. 2(5))
<i>c</i>	Sunday, 27 May 2001	the weekly holiday in Negeri Sembilan – (excluded under O. 3 r. 2(5))
	Monday, 28 May 2001	1st day
	Tuesday, 29 May 2001	2nd day
<i>d</i>	Wednesday, 30 May 2001	3rd day
	Thursday, 31 May 2001	4th day
	Friday, 1 June 2001	5th day
<i>e</i>	Saturday, 2 June 2001	Birthday of DYMM Yang Di Pertuan Agong – public holiday – (excluded under O. 3 r. 2(5))
	Sunday, 3 June 2001	the weekly holiday – (excluded O. 3 r. 2(5))
<i>f</i>	Monday, 4 June 2001	Birthday of Prophet Mohammad, public holiday – (excluded under O. 3 r. 2(5))
	Tuesday, 5 June 2001	6th day
<i>g</i>	Wednesday, 6 June 2001	7th day
	Thursday, 7 June 2001	8th day

I therefore hold that the correct date of the act of bankruptcy is on Thursday 7 June 2001, and not 2 June 2001 as stated in para 4 of the CP.

h **Is The CP Invalidated?**

Arising from the aforesaid incorrect date, it becomes necessary for me to consider whether the CP has been invalidated thereby.

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It was argued for the JD that:

(1) the JC cannot amend the incorrect date as it is out of time, citing *Re a Debtor (No. 31 of 1969), ex parte the Debtor v. Triggs Turner & Co* [1970] 1 All ER 920;

(2) the JC could not rely on s. 131 and *Re Liow Fong Mooi; ex p Malayan Banking Bhd* [2000] 6 CLJ 63 HC, as the defect herein is not a mere irregularity, and cited in support *Re V. David, ex p United Asian Bank Bhd* [1991] 2 MLJ 127; and *Tengku Iskandar bin Tengku Ahmad v. Sime Bank Bhd* [2002] 1 MLJ 312.

It was submitted for the JC that:

(1) even if the date of the act of bankruptcy had been incorrectly stated, no substantial injustice had been occasioned to the JD, and so can be remedied under s. 131. *Re Liow Fong Mooi; supra*; and *Re Arif bin Sionggong, ex p Arab Malaysian Finance Bhd* [1995] 4 BLJ 359 were relied on; or

(2) alternatively, s. 93(3) gives the court the discretion to amend any written process or proceedings.

I shall now consider the authorities cited for the JD.

In *Re a Debtor, supra*, an application to amend a bankruptcy petition was granted by substituting the respondents for W as the petitioning creditors and also by substituting, as the act of bankruptcy alleged, failure to comply with the respondent's bankruptcy notice, in place of failure to comply with W's notice. The petition as so amended was, however, invalid because the time for complying with the respondent's notice did not expire until the end of the day on which the petition was presented. The respondent applied for the petition to be further amended under s. 109(3) of the Bankruptcy Act 1914 (which is in *pari materia* with our s. 93(3)) by restoring the act of bankruptcy originally relied on ie, the failure to comply with W's bankruptcy notice before 21 May 1969. At the date of the hearing of the application, more than three months had elapsed since the occurrence of that act of bankruptcy. Ungood-Thomas and Goff JJ of the Chancery Division held that an amendment would not be allowed which would introduce an act of bankruptcy more than three months after its occurrence, whether the act had at some time previously appeared on the petition or not.

- a* In the instant appeal, it is to be noted that the JC here is not seeking to rely solely on s. 93(3), as there was an alternative contention based on s. 131.

Re V. David, supra, cited for the JD, did not concern a misstatement of the date of the act of bankruptcy, but it was in relation to:

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1. the omission from the petition of a clause as to attestation;
 2. the petition being wrongly signed by the petitioner's attorney; and
 3. non-service of a sealed copy of the petition on the judgment debtor.

- c* On these facts, Zakaria Yatim J (later FCJ) held that the defects were serious which had caused substantial injustice.

- d* Again, Tengku Iskandar, *supra*, is not an authority pertaining to a misstatement of the date of the act of bankruptcy. There, a judgment in default was left to stand for nearly 10 years before commencing bankruptcy proceedings against the debtor. No leave was obtained from the court to issue the bankruptcy proceedings as the judgment was obtained more than six years ago. The JD's contention that the bankruptcy notice was null and void was sustained by Suriyadi J who held that s. 131 would not cure the shortcoming here.

- e* On the issue as to whether the CP has been invalidated thereby, s. 131 relied on by the JC is of crucial importance and is reproduced as follows:

131. Formal defect not to invalidate proceedings.

- f* No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

- g* In my view, s. 131 specifically prevents the invalidation of any proceeding in bankruptcy by reason of any formal defect or irregularity unless such defect or irregularity has caused substantial injustice. What constitutes a formal defect or irregularity would depend on the facts and circumstances of each case and whether the formal defect and irregularity goes into the substance of the complaint in the CP. For this purpose I shall embark upon an analysis of the relevant decisions of our court in which s. 131 has been considered.
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In *Re Arif bin Siongong*, *supra*, the bankruptcy petition brought against the debtor stated that the debtor had committed an act of bankruptcy on 22 November 1993 but the official assignee claimed that it was committed on 23 November 1993. There was no evidence of the JD's attempt to pay up the sum claimed in the petition. The petitioner submitted that the error was due to a miscalculation and urged the court to exercise its discretion under s. 131. Tee Ah Sing JC (now J) held at p. 254 F-G that the misstatement was merely a formal defect or irregularity and hence remediable under s. 131 as no substantial injustice has been caused by it.

A misstatement of the act of bankruptcy occurred in *Re Liow Fong Mooi*, *supra*, in that the correct date should have been 19 August 1999 and not 27 November 1996. The JD's argument that this misstatement was fatal was rejected by Clement Skinner JC (now J) who held that the error in stating the date on which the act of bankruptcy took place was an irregularity only which did not go to the substance of the complaint in the petition, and that such mistake comes within the contemplation of s. 131.

It is significant to state that both the learned judges have declined to follow the decision of Richard Talalla J (as he then was) in *Re Fadzil bin Othman, ex p Malayan Banking Bhd* [1994] 2 MLJ 474 to the effect that the misstatement was fatal where the bankruptcy petition stated that the act of bankruptcy was committed on 15 June 1992 when the correct date was 16 June 1992.

On my part, I subscribe to the concurrent views of Tee Ah Sing JC (now J) and Clement Skinner JC (now J). With regret, I do not feel able to agree with the decision of Richard Talalla J (as he then was). That being the case, I am of the view that the misstatement as to the incorrect date herein is a mere formal defect or irregularity which does not cause any substantial injustice and is not one which cannot be remedied by an order of the court eg, by way of an amendment to the misstatement of the incorrect date of 2 June 2001 to the correct date of 7 June 2001 which I hereby do.

I am not unmindful of the statement by the Court of Appeal in *Abdul Hamid & Anor v. Polynesia Offshore Supplies (M) Bhd* [1990] 3 MLJ 94, which was followed by Syed Ahmad Idid J (as he then was) in *Re Pg. Ahmad*, *supra*, that bankruptcy proceedings are of a quasi-penal nature, and so it is imperative that procedural requirements are strictly complied with. However, in this regard, it is essential to examine the crux of the JD's contention which is merely based on a mere misstatement of the date of the act of bankruptcy and there has been no submission that the JC herein has not strictly complied with the

a procedural requirements. In the circumstances, I am of the view that the misstatement being merely a formal defect or irregularity has not caused any substantial injustice at all, and the question of non-compliance with the strict procedural requirements would not arise here.

b **Conclusion**

The learned registrar's decision in dismissing the JD's application is correct and is hereby affirmed, with the result that this appeal is without merits and is hereby dismissed.

c As to the costs, since the JD's contention on the incorrect date has been upheld, and the JC's submission in relation to s. 131 has been sustained, the position is placed in equilibrium, in which case, the fair and reasonable order is for each party to bear its own costs in this appeal.

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